United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIG.

76-7174

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

COASTAL STATES GAS CORP.,

Plaintiff-Appellant,

—against—

ATLANTIC TANKERS, LTD.,
ATLANTIC TANKERS, LTD.—MONROVIA,
ST. PAUL MARINE TRANSPORT CORP.,

P/S

Defendants-Appellees.

APPEAL FROM UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT COASTAL STATES GAS CORPORATION

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Statement

The defendant-appellee, Atlantic Tankers, Ltd., (hereinafter "Atlantic") has misconstrued the basic issue and simultaneously introduced clearly extraneous issues in its brief. The only issue is whether a guarantor is released when the obligee of the guaranteed contract sells his interest and there is no consent of the guarantor.

Atlantic's phrasing of the Issue Presented is indicative of the extraneous nature of comments throughout its brief. Foreign Energy Tankers, Inc.'s (hereinafter "FETI") status as a subsidiary of Coastal States Gas Corporation

(hereinafter "Coastal") is irrelevant. Atlantic also makes much of FETI's subsidiary status in its Statement of Facts, which is equally irrelevant. The fact is that Coastal guaranteed FETI's performance to St. Paul Marine Transport, who sold to Union Carriers. Coastal never made a guaranty to Union, let alone Atlantic. Addenda Nos. 1 and 2 to the charter (Appendix 23A, 24A) represent the transfer of ownership and concommitant transfer of the charter party in question. It must be clearly noted that three parties signed each of these addenda, the old owner, the new owner (in each instance) and the charterer. In *no* case was the guarantor of FETI's performance a party to either addenda. Since the addenda were drawn amongst three parties, it is elementary that this clause clearly only refers to terms, conditions and exceptions as amongst themselves. It may not bind parties not privy to either of these agreements. The addenda do not in any manner refer to a *guarantee* to the charter party. Coastal's consent was required for the guaranty to pass to the new owner. Union Carriers, the first to purchase the vessel ST. PETER, sent three messages requesting that Coastal issue a ". . . Guarantee letter in favor of new owner." Union never received such a new letter of Guaranty. Then Union sold the vessel ST. PETER to defendant-appellee Atlantic. Atlantic (or Union) never received a guarantee from Coastal. How then can Atlantic now say Coastal gave it a guarantee?

Atlantic has seen fit to include Judge Ward's decision in *Coastal States Gas Corporation and Foreign Energy Tankers, Inc.* v. *Century Tankers, Ltd.*, 75 Civ. 2172 (SDNY, 1975) as an appendix to its brief. We must point out that Judge Ward was not presented with the issue at bar. Although some of the names are the same, the facts are very different. *Century* did not involve the assignment of a charter party and its consequent release of the guarantor.

POINT I

The Order of the Court Below Is Appealable.

This Honorable Court has stated twice within less than one year that an order compelling arbitration is a final order and hence appealable. *Compania Espanola De Petroleos, S. A.* v. *Nereus Shipping S. A.*, 527 F.2d 966 (2d Cir., 1975); *N.V. Maatchappij Voor Industriele Waarden* v. *A. O. Smith Corporation*, (2d Cir. decided April 1, 1976, Nos. 618, 681, Slip Op. page 2905).

Atlantic is grasping at straws when it suggests that these such recent cases were decided incorrectly. This Court in 1975 and 1976 has decided that such an order *is* appealable!

POINT II

Alteration of the Principal Contract Has Released Coastal as Guarantor.

The law on the enforceability of a guarantee by an assignee is found at Stearns, *The Law of Suretyship*, §6.5 (5th Ed., 1951) as set forth in Coastal's Brief pp. 15-16. The substitution of a new party in place of one of the original contracting parties, as by an original party assigning his interest in the contract, will discharge the guarantor.

Cases presented by Atlantic for a contrary position are clearly distinguishable. In those cases, the guarantor was not released because his position was not prejudiced by the assignment. Indeed, most of those cases dealt with real property situations. Assignment of a guaranteed bond and mortgage by a creditor will not alter the guarantor's position. The debtor will, at the assignment, already have

received the monies from the creditor and his only altered obligation will be to repay a different creditor. Therefore, the debtor's position is unaffected. The guarantor's obligations will not become prejudiced by any one of the following instances which Professor Williston calls essential for discharge of the surety:

1. an increase in the surety's risk.

2. an increase in the chance that the principal debtor will default and a decrease in his ability to reimburse or exonerate the surety or

3. an impairment of the right of subrogation.

10 *Williston on Contracts*
Third Edition §1225

The guarantor is released when he becomes detrimentally affected by one of these prejudices. Atlantic's cases do not evidence the requisite detriment and do *not* stand for the proposition that the guarantor is bound despite the assignment.

In order to assist the Court in noting the difference between the cases cited by Atlantic and the issue before it, we take the liberty of examining appellee's citations.

Sutter v. *Nenninger*, 115 Misc. 359, 189 N.Y.S. 662 (Kings County, 1921) aff'd 204 A.D. 837 held the guarantor was not released because his status vis-a-vis the principal debtor and creditor was not detrimentally affected. One of Professor Williston's tests had not been met. The Court did *not* hold that a guarantor is bound to his contract of guarantee despite assignment of the principal debt.

Craig v. *Parkis*, 40 N.Y. 181 (1869) involved a series of assignments of the principal debt in which each assignor guaranteed the debt to his assignee. Thus the guarantor,

obligor and assignor were all the same party, a James Parkis. The court was thus holding that a guarantee made by an assignor to his assignee was valid and enforceable. It was *not* holding that a guarantor's obligation to the principal obligee survived assignment and was enforceable by an assignee.

In *Flank* v. *Kuhlmann,* 63 Misc. 334 (Sp. Ct., App. Term, 1909) the obligee's (landlord's) consent was required to assign a lease. The court held that the guarantor of the tenant's performance was not released because the obligor (tenant) assigned the lease without the landlord's permission. If the court had released the guarantor it would have created a situation in which guarantors could be relieved of their obligation by having the obligee perform a void transfer without the landlord's permission. The policy requirement in *Flank* makes any analogy to the case at bar, in which the *obligor's* (FETI) permission was required in order to assign the charter party, quite inappropriate.

In the Matter of 24-52 44th Street, Long Island City, 176 Misc. 249, 26 N.Y.S.2d 265 (Sup. Ct., 1941) the guarantor and obligor of corporate bonds were the same bankrupt corporation. The issue was whether the trustee in bankruptcy should pay the liquidating dividend to assignees or assignors of the corporation's bonds. Since the court fully realized that the corporation had a duty to pay the monies as an obligor the issue of the corporation's release as guarantor (its other simultaneous role) was never entertained. The discussion of assignment was only relevant on the issue of preference of payment amongst the assignees and assignors. Thus the case is inapplicable to the case at bar.

The discussion of *Standard Sewing Machine Co.* v. *Smith,* 51 Mont. 245, 152 P. 38 (1915) by Atlantic in its brief, is

inaccurate. The case actually held that the guarantor was released by the assignment of the principal debt.

Atlantic argues (Brief p. 10) that Coastal should not be discharged because its risk was not increased. Simultaneously, Atlantic argues that FETI's obligation to Atlantic was not increased. Proper analysis shows that the first position is in error and that the second is irrelevant.

As the vessel ST. PETER's performance deteriorated because of the second buyer's (Atlantic) poor maintenance, the probability of FETI's repudiation of the contract increased. Coastal contracted with FETI and St. Paul with full knowledge of the owner's and charterer's performance and maintenance records. Coastal therefore was able to calculate its risk and the probability that it may be required to perform upon FETI's default. When the new owner took possession (Union Carriers) its upkeep record was unknown to Coastal. Finally, when still another new owner bought the vessel, its ability was again unknown to Coastal. Atlantic proved unable to maintain the vessel, which led to FETI's termination of the charter. Coastal has not contracted to be called on to perform to Atlantic because of FETI's repudiation. The agreement, arranged without consent of Coastal *absolutely* increased Coastal's risk and probability of performance compared to that of the FETI-St. Paul contract. Such increase in the probability of the guarantor's performance due to unconsented to acts amongst the principal obligor and obligeee (assignment) discharged Coastal as a guarantor. *Williston, supra.*

The correct statement of the law is Stearns' statement previously referred to. The guarantor is released by assignment of the principal debt.

POINT III

The Guarantee Was Personal and Unassignable.

Those cases which Atlantic has cited in its brief, such as *Morgan* v. *Smith*, 70 N.Y. 537 (1877) required consent of the obligee before it could assign the principal debt. When the obligee granted the requisite permission, it included clauses in the consent so that the relation of the landlord-tenant (obligee/obligor) and convenants in the lease (the Guarantee) would not be affected by the assignment. The court held at 545 that "This (additional clause) was tantamount to a condition that the agreement between plaintiff (obligee) and her lessees (obligor) (to assign the lease) should not operate to discharge the sureties". The absence of these additional clauses in the case at bar make *Morgan* inapposite.

Stillman v. *Northrup*, 109 N.Y. 473, 17 N.E. 379 (1888) involved the defendant's guarantee of a mortgage to Nelson Stillman as *plaintiff's agent*. Nelson then twice assigned the mortgage to the plaintiff The first time the guarantee was not mentioned. The second time the guarantee was specifically assigned along with the mortgage. The guarantee was never personal to Nelson, but only as plaintiff's agent. The guarantee always ran in favor of the principal, the assignee. The court said that the guarantee was assigned because of its second *specific* assignment. The guarantee may not have had effect if it rested solely on the first assignment.

Atlantic has stated at p. 8 of its Brief that:

> "a guaranty is assignable with the principal obligation unless it clearly appears that the instrument is 'special', that is, the guarantor relies upon a personal trust in the original recipient and in him alone."

The documents attached to this Reply Brief, Exhibits A, B and C demonstrate that FETI, Coastal, the original owner, St. Paul Marine Transport Corp., and the second owner, Union Carriers Corporation, Monrovia, all understood the guarantee to be a personal obligation of Coastal. Union asked, and Coastal refused, to supply a separate guarantee running to the second owner. Thus, as a matter of fact, the guarantee was intended by all of the parties to be and actually was, personal. The very fact that Atlantic argues the guarantee was not personal proves that they never were a party to it and failed to understand its terms. If they had been a party to the guarantee they would have understood the personal nature as the exhibits show the previous contracting owners understood it.

The Brief submitted by Coastal has fully set forth the law that the unconsented assignment of the charter party to Atlantic has released Coastal from its guarantee to St. Paul.

CONCLUSION

This Honorable Court should reverse the decision of the District Court. Coastal has no duty to arbitrate disputes between FETI and Atlantic, and Coastal never made a guaranty to Atlantic.

Respectfully submitted,

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New York, New York 10005

RICHARD H. SOMMER
JOHN P. VAYDA
of Counsel

1a

Exhibit A

TELEX: RCA 232496

Boyd, Weir & Sewell

INCORPORATED

Steamship Agents and Ship Brokers

17 Battery Place

New York, N.Y. 10004

April 16, 1974

T. M. McQuilling & Co.
17 Battery Place, Room 2034
New York, N. Y. 10004

Att: Mr. John De Santis

M/T "ST. PETER"
C/P dated 8/2/73

Dear Sir:

We enclose herewith a copy of ADDENDUM NO. 1 to the subject charter party covering the transfer of ownership.

This Addendum has been forwarded for signature by both the old and new Owner and as soon as it is received by us we shall pass it to you to arrange for the Charterer's signature.

In accordance with our verbal agreement, the new Owners are asking for a similar Letter of Guarantee as that given to the original Owner and for your ready reference we enclose herewith a copy, the text of which can be followed.

Very truly yours,

J. Christopher
President

JC:ajv

Encs. 2

APR 16 1974

2a

Exhibit B

"St. Peter Master Charter"

I 4-532

COSTATES HO
MCQUILLING BROKERAGE

APRIL 23, 1974

ATTN. MR. C.E. NEUBAUER

RE ST. PETER. FOLLOWING RECEIVED FROM OWNERS AGENTS:

QUOTE

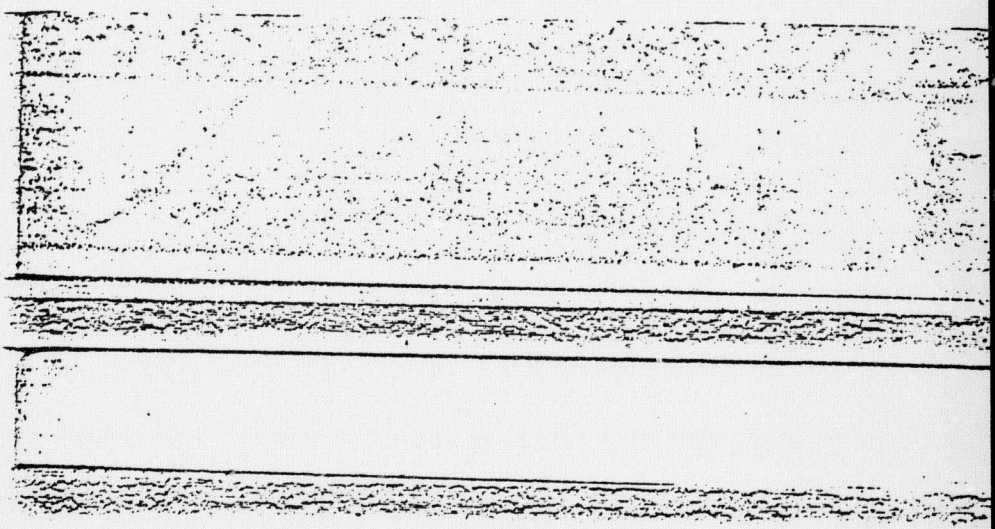
ST. PETER--OWNERS INFORM CHANGED OWNERSHIP TO UNION CARRIERS CORP OF MONROVIA - ON APRIL 19TH - PLS INFORM CHRTRS AS WE PREPARING ADDENDUM - ACCORDINGLY, STOP ALSO REQUIRE NEW LETTER OF GUARANTEE FROM COASTAL TO NEW OWNERS

UNQUOTE

HOW RECD PLS OK

COSTATES HO

QUILLING NYK
@



COSTATES HO

GAZUSA BSN

9

COSTATES HO

QUILLING NYK

MCQUILLING BROKERAGE

FEBRUARY [illegible] 1974

Fld
ST. Peter
Master charter

I 2-132

3a

Exhibit C

ATTN. MR. C. E. NEUHAUER

FOLLOWING RECEIVED FROM OWNERS ST. PETER

QUOTE

ST. PETER/COASTAL STATES

FYG OWNERS ADVISE PLANNING CHANGE VSLS OWNERSHIP FROM ST. PAUL NAVIGATION CORP. TO UNION CARRIER CORPORATION--MONROVIA (BELONGING SAME GROUP) AND HEREBY ASKING CHARTS AGREEMENT AND CONSENT WHICH SHOULD INVOLVE ALSO CHANGE OF COASTAL'S GUARANTEE LETTER IN FAVOR NEW OWNERS STOP PLS ADVISE THANKS

UNQUOTE

QUILLING NYK

COSTATES HO

9

2 copies

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